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MAR 19 1999

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

RICHARD W. WIEKING
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

STATE OF CALIFORNIA DEPARTMENT
OF TOXIC SUBSTANCES CONTROL,

Plaintiff,

v.

WAYMIRE DRUM COMPANY, INC. and
EDWARD L. WAYMIRE,

Defendants.

No. C-98-03834 PJH

ORDER GRANTING MOTION FOR
JUDICIAL APPROVAL AND ENTRY
OF SETTLEMENT AGREEMENT AND
CONSENT DECREE

FILE COPY

Plaintiff State of California Department of Toxic Substances Control ("DTSC") moves for judicial approval of settlement agreement and consent decree between DTSC and defendants Waymire Drum Company, Inc. ("WDC") and Edward L. Waymire ("Waymire"), pursuant to the provisions of the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. § 9601 et. seq. Having considered the parties' submissions and good cause appearing, the court finds the terms of the consent decree to be fair and reasonable, and in accord with the law as well as public policy. Accordingly, the court hereby GRANTS the motion and approves entry of the consent decree.

BACKGROUND

The parties seek the court's approval and entry as a consent decree, pursuant to section 113(f) of CERCLA, 42 U.S.C. § 9613(f), of the settlement agreement and consent decree entered between DTSC and defendants WDC and Waymire concerning liability for recovery of the costs that DTSC has incurred and will incur in the future, in response to the release and threatened release of hazardous substances

1 at and from a former drum reconditioning facility located at 1212 Thomas Avenue, San
2 Francisco, California ("the property"). The property was operated as a drum
3 reconditioning facility from approximately 1948 until 1987. As part of the reconditioning
4 process, the drums were flushed and recoated, releasing residual contents of the
5 drums and reconditioning chemicals from the property, which migrated to the
6 groundwater under the property and the rest of the site.¹ WDC's wholly owned
7 subsidiary, Waymire Drum & Container Company, Inc., owned the property for 14
8 months from January 1978 until March 1979.

9 Since 1982, DTSC has investigated for hazardous substances at the property (in
10 the soil and groundwater) and detected more than 70 different chemicals defined as
11 "hazardous substances" by state and federal law. As a result of the investigation,
12 DTSC has estimated the total cost of investigation and cleanup to be approximately
13 \$13.2 million.

14 In 1991, defendants approached DTSC, seeking to have defendants removed
15 from DTSC's list of potential responsible parties for the property. Counsel for WDC
16 and Waymire argued that WDC and Waymire had no liability to DTSC for Waymire
17 Container's activities at the site, and that, in any event, WDC's 1980 discharge in
18 bankruptcy precluded DTSC from recovering sums from WDC based upon its alleged
19 activities at the site in 1978 and 1979. Upon DTSC's rejection of defendants'
20 arguments, defendants tendered defense of the claim to WDC's 1978 and 1979 insurer.
21 Defendants and the insurer proposed a settlement offer of \$200,000 (insurance policy
22 limit) in return for releasing defendants from costs incurred (present and future). DTSC
23 rejected the offer on the ground that WDC's post-1979 insurers were also potentially
24 liable for defraying the costs of any judgment against WDC, relying on the California
25 Supreme Court's ruling that liability insurers are obligated to defend claims for losses to
26 third parties occurring during the policy period as a result of pre-policy period release

27
28 ¹ The total area to which hazardous substances have been or may be released
from the property is referred to as "the site."

1 of toxic chemicals to the environment. See Montrose Chemical Corp. v. Admiral
2 Insurance Co., 10 Cal.4th 645, 685-89 (1995). As a result of defendants' subsequent
3 negotiations with several of WDC's post-1979 and pre-1985 insurers, defendants were
4 able to increase the settlement offer to \$400,000.

5 After the parties had agreed on the terms of the settlement, DTSC filed its
6 motion for entry of the consent decree on November 19, 1998. The provisions of the
7 consent decree are designed to eliminate any liability that defendants might have to
8 DTSC. The consent decree provides for notice to all interested parties upon
9 establishment of a briefing and hearing schedule by the court.

10 DISCUSSION

11 A. Legal Standard.

12 "A consent decree is 'essentially a settlement agreement subject to continued
13 judicial policing.'" United States v. Oregon, 913 F.2d 576, 580 (9th Cir. 1990) (citation
14 omitted), cert. denied sub nom., Makah Indian tribe v. United States, 501 U.S. 1250
15 (1991). Approval of a proposed consent decree is committed to the discretion of the
16 district court. See id. The district court should enter the decree if it is fair, reasonable,
17 and equitable, and does not violate the law or public policy. See id.; see also Sierra
18 Club v. Electronic Controls Design, Inc., 909 F.2d 1350, 1355 (9th Cir. 1990); United
19 States v. Conservation Chemical Co., 628 F.Supp. 391, 400 (W.D. Mo. 1985) (citing
20 United States v. Seymour Recycling Corp., 554 F.Supp. 1334 (S.D. Ind. 1982)).
21 Because the court's approval "is nothing more than 'an amalgam of delicate balancing,
22 gross approximations, and rough justice,'" however, "the court need only be satisfied
23 that the decree represents a 'reasonable factual and legal determination.'" United
24 States v. Oregon, 913 F.2d at 581 (citations omitted).

25 The court's discretion is to be exercised in light of the strong policy favoring
26 voluntary settlement of litigation, see Ahern v. Central Pacific Freight Lines, 846 F.2d
27 47, 49 (9th Cir. 1988) ("Settlement agreements conserve judicial time and limit
28 expensive litigation"), and in particular, in accord with CERCLA's express policy of

1 encouraging early settlements. See United States v. Montrose Chemical Corp. of
2 California, 50 F.3d 741, 746 (9th Cir. 1995). The presumption in favor of settlement is
3 particularly strong where a consent decree has been negotiated by a governmental
4 agency specially equipped, trained, or oriented in the field. See Conservation Law
5 Foundation of New England, Inc. v. Franklin, 989 F.2d 54, 58 (1st Cir. 1993); see also
6 United States v. Montrose, 50 F.3d at 746 ("CERCLA's policy of encouraging early
7 settlements is strengthened when a government agency charged with protecting the
8 public interest 'has pulled the laboring oar in constructing the proposed settlement.'"
9 (quoting United States v. Cannons Eng'g Corp., 899 F.2d 79, 84 (1st Cir. 1990))).

10 In applying the standard set forth above to cases brought under CERCLA, courts
11 should consider the following criteria: 1) fidelity to CERCLA, 2) procedural fairness,
12 3) substantive fairness, and 4) reasonableness. See Cannons, 899 F.2d at 85-93.

13 *B. DTSC's Motion for Entry of Consent Decree.*

14 The court finds that the terms of the proposed consent decree are consistent
15 with the purposes of CERCLA, and that the settlement is both fair and reasonable.
16 First, the consent decree is consistent with the intent of Congress to allow government
17 agencies to recover their environmental response costs rapidly, so that the sums
18 recovered can be used either at the same site or at other sites. See, e.g., 42 U.S.C.
19 § 9613(f)(2); 42 U.S.C. § 9622(g) (requiring the United States Environmental Protection
20 Agency to conclude de minimus settlement agreements whenever practicable and in
21 the public interest); and 42 U.S.C. §9622(h)(1) (allowing federal agency heads to settle
22 CERCLA claims at smaller sites without United States Department of Justice approval).
23 The consent decree affords DTSC a rapid and certain recovery of \$400,000 from WDC
24 and Waymire, which it can put to use at the site, or at other sites at which it is
25 conducting cleanup activities. Absent the consent decree, DTSC would be put to the
26 expense, delay and risks inherent in litigating WDC and Waymire's underlying liability,
27 pursuing WDC and Waymire into bankruptcy court, and ultimately pursuing WDC's
28 insurers in coverage litigation. The defendants do not have significant assets, and

1 WDC's liability policy for the years 1978 and 1979 has a limit of \$200,000. There is the
2 likelihood that litigation may result in recovering less than the amount negotiated in the
3 settlement agreement, *risking delay and making recovery uncertain*. Under these
4 circumstances, the consent decree is consistent with the purposes of CERCLA,
5 favoring a rapid conclusion.

6 Second, the settlement is fair. Courts examine both the procedural and
7 substantive fairness of consent decrees. To determine procedural fairness, a court
8 should look to the negotiation process and "attempt to gauge its candor, openness,
9 and balancing power." Arizona v. Nucor Corp., 825 F.Supp. 1452, 1456 (D. Ariz.
10 1992) (quoting Cannons, 899 F.2d at 84). The parties negotiated the settlement terms
11 memorialized in the consent decree at arms-length over a three-year period. Both
12 sides were represented by counsel. The negotiations broke down when DTSC rejected
13 a settlement offer equivalent to the total limits of WDC's 1978 and 1979 liability
14 insurance policies (\$200,000). In light of the California Supreme Court's Montrose
15 decision, DTSC requested WDC and Waymire to seek the participation of WDC's post-
16 1979 insurers in funding the defendants' settlement with DTSC. Negotiations resumed
17 thereafter with increased funds for settlement made available by WDC's post-1979
18 insurers, doubling the settlement funds to \$400,000. Even after plaintiff and
19 defendants reached an agreement in principle on a settlement amount of \$400,000 in
20 1996, it still took two years to conclude a written settlement agreement. The delays
21 were a result of negotiations regarding the wording of the consent decree and having to
22 verify that the only funds defendants had to offer DTSC in settlement were the
23 proceeds of WDC's insurance policies. As such, the consent decree is procedurally
24 fair.

25 Also, the settlement agreement is substantively fair. Where liability must be
26 allocated among numerous defendants, the court must scrutinize a proposed consent
27 decree to determine whether the estimates of responsibility and damages were fairly
28 proportioned among the settling defendants. Cannons, 899 F.2d at 87-89. In

1 assessing substantive fairness, courts often "compare the proportion of total projected
2 costs to be paid by the settlors with the proportion of liability attributable to them, and
3 then . . . factor into the equation any reasonable discounts for litigation risks, time
4 savings, and the like that may be justified." United States v. Montrose, 50 F.3d at 747.

5 In this case, a WDC subsidiary operated the property for 14 months out of the
6 site's 480 months of operation. WDC's proportionate share of the estimated \$13.2
7 million it will take to fully investigate and clean up the site would be \$380,000. DTSC
8 reviewed the defendants' financial positions and concluded that the only assets
9 defendants had to contribute to the remediation of the site were WDC's insurance
10 benefits. The parties have presented evidence that, absent a settlement agreement,
11 cost recovery from the defendants would inevitably involve bankruptcy proceedings and
12 litigation regarding the extent to which WDC's various insurance carriers would be
13 obligated to cover WDC's liability to DTSC. The consent decree provides for twice the
14 total limits of WDC's insurance policies for the 14 months during which a WDC
15 subsidiary owned and operated the property. The court finds that the settlement
16 amount is substantial in light of the fact that although WDC's post-1979 insurance
17 carriers could potentially be compelled to cover WDC's liabilities under the Montrose
18 decision, the insurance policies restrict coverage to those losses and injuries
19 occasioned by "sudden and accidental" releases of toxic chemicals.

20 Finally, the substantive fairness of the consent decree is enhanced by the
21 inclusion of several non-payment provisions, such as the provision that DTSC may
22 pursue the defendants for costs it incurs as a result of newly-discovered site conditions.
23 The consent decree also resolves defendants' liability as alleged successors to any
24 previous owner or operator of the property, to ensure that no prior owner or operator is
25 released from its potential liability to DTSC.

26 Third, the court finds that the consent decree is reasonable. In considering the
27 reasonableness of the agreement, the court should consider both the efficacy of the
28 settlement in compensating the public for actual and anticipated remedial response

1 costs and the relative strength of the parties' litigation positions. Cannons, 899 F.2d at
2 89-90. Because the adequacy of those remedies can be an "enormously complex" --
3 subject, the court need not assess whether the government made the best possible
4 settlement, and "the agency cannot realistically be held to a standard of mathematical
5 precision. If the figures relied upon derive in a sensible way from a plausible
6 interpretation of the record, the court should normally defer to the agency's expertise."
7 Id. at 90; see also Nucor, 825 F.Supp. at 1464 (court's role is not to determine whether
8 the agreement is the best possible settlement the state could have achieved, but rather
9 whether the settlement is within the reaches of the public interest).

10 Here, no objection having been raised regarding the efficacy of DTSC's
11 proposed cleanup, the court defers to DTSC's estimate of the amount required to
12 satisfactorily compensate the public for the actual and anticipated costs of remedial
13 and response measures. Weighing the complexities and delays involved in pursuing
14 litigation against the defendants and WDC's insurers versus the proposed settlement
15 amount, the court finds that the compensation for response costs is adequate and
16 reasonable.

17 The consent decree also reflects the relative strength of the parties' bargaining
18 positions. As set forth above, the defendants do not have assets to contribute to the
19 cleanup other than the insurance policies limited to \$200,000. And while WDC's
20 insurers are potentially liable, those insurers have substantial defenses to any
21 assertion of coverage other than "sudden and accidental" injuries and losses. The
22 consent decree affords DTSC twice the limits of the insurance policies without putting
23 DTSC to the delays and risks of bankruptcy proceedings and insurance coverage
24 litigation.

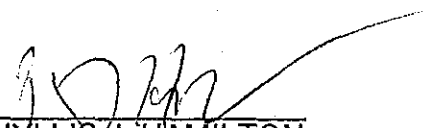
25 CONCLUSION

26 In accordance with the foregoing, the court finds that the proposed consent
27 decree is fair and reasonable, and that it furthers the goals of CERCLA. The motion of
28 DTSC for judicial approval of the consent decree is hereby GRANTED.

1 This order fully adjudicates plaintiff's motion for judicial approval of settlement
2 agreement and consent-decree found at Docket No. 11.

3 **IT IS SO ORDERED.**

4
5 Dated: March 19, 1999

6
7
8 
PHYLLIS J. HAMILTON
United States Magistrate Judge

9 Copies mailed as follows:

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28

United States District Court
for the
Northern District of California
March 19, 1999

* * CERTIFICATE OF SERVICE * *

Case Number:3:98-cv-03834

CA Dept of Toxic Sub

vs

Waymire Drum Co Inc

I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Northern District of California.

That on March 19, 1999, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office.

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Richard W. Wieking, Clerk

BY: 

Deputy Clerk

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

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NORTHERN DISTRICT OF CALIFORNIA

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STATE OF CALIFORNIA DEPARTMENT
OF TOXIC SUBSTANCES CONTROL,

Plaintiff,

No. C-98-3834 PJH

v.

ORDER VACATING HEARING DATE


WAYMIRE DRUM COMPANY, INC.,
et al.,

Defendants.

The court has reviewed the papers submitted in connection with plaintiff's motion for entry of consent decree. The court finds the motion to be appropriate for decision without oral argument. Accordingly, the hearing on the motion, previously set for March 16, 1999, is hereby VACATED. The court will issue a written decision on the papers.

IT IS SO ORDERED.

Dated: February 5, 1999


PHYLLIS J. HAMILTON
United States Magistrate Judge

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10 UNITED STATES DISTRICT COURT
11 NORTHERN DISTRICT OF CALIFORNIA

12 STATE OF CALIFORNIA DEPARTMENT OF)
TOXIC SUBSTANCES CONTROL,)

13 Plaintiff,)
14)

15 v.)

16 WAYMIRE DRUM COMPANY, INC., a)
California corporation; and EDWARD)
17 L. WAYMIRE, an individual,)

18 Defendants.)
19
20

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RICHARD W. WIERING
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

FILE COPY

No. C 98-03834 PJH

SETTLEMENT AGREEMENT
AND CONSENT DECREE

21 INTRODUCTION

22 Plaintiff, the State of California Department of Toxic
23 Substances Control ("DTSC"), has filed a complaint (the
24 "Complaint") in the United States District Court for the Northern
25 District of California (the "Court"), pursuant to the
26 Comprehensive Environmental Response, Compensation and Liability
27 Act ("CERCLA"), 42 U.S.C. sections 9601 et seq. The Complaint
names as defendants the following: Waymire Drum Company, Inc.

1 ("WDC") and Edward L. Waymire ("Waymire") (hereafter collectively
2 referred to as "Defendants"). Plaintiff and the Defendants now
3 enter into this Settlement Agreement and Consent Decree (the
4 "Consent Decree"), and move the Court to approve it and enter it
5 as a consent decree of the Court, in order to settle this action
6 on the terms and conditions set forth herein.

7 DEFINITIONS

8 A. All terms used in this Consent Decree that are
9 defined in section 101 of CERCLA, 42 U.S.C. § 9601, shall have
10 the same meaning set forth in that section.

11 B. "DTSC", as used in this Consent Decree, shall mean
12 DTSC; its predecessors including, but not limited to, the Toxic
13 Substances Control Program of the State of California Department
14 of Health Services; and its successors.

15 C. "Hazardous Substance(s)", as used in this Consent
16 Decree, shall mean any substance designated as a "hazardous
17 substance" by section 101(14) of CERCLA, 42 U.S.C. § 9601(14), or
18 by section 25316 of the California Health and Safety Code, but
19 shall not include any substance excluded from designation as a
20 "hazardous substance" by section 25317 of the California Health
21 and Safety Code.

22 D. The "Site", as used in this Consent Decree, shall
23 refer to the property located at 1212 Thomas Avenue, in the City
24 and County of San Francisco, California and shall comprise the
25 total area to which Hazardous Substances have been released,
26 and/or threatened to be released, at and/or from that property.
27 A legal description of the property located at 1212 Thomas

1 Avenue, San Francisco (the "Property") is attached hereto as
2 Exhibit A and is incorporated herein by this reference.

3 E. The term "Response Costs", as used in this Consent
4 Decree, shall include all costs of "removal", "remedial action"
5 or "response" (as those terms are defined by section 101 of
6 CERCLA), incurred or to be incurred by DTSC in response to the
7 release or threatened release of Hazardous Substances at or from
8 the Site. Said term shall include, but not be limited to, direct
9 labor costs; contractor, consultant and expert costs; travel and
10 any other out-of-pocket expenses; the costs of identifying,
11 developing evidence against, and pursuing claims against persons
12 or entities liable for the release or threatened release of
13 Hazardous Substances at or from the Site; indirect costs;
14 oversight costs; applicable interest charges; and attorneys'
15 fees.

16 F. "Party" or "Parties", as used in this Consent
17 Decree, shall mean one or all of the parties to this Consent
18 Decree, as indicated by the context in which that term is used.

19 RECITALS

20 A. DTSC contends that it is the California state
21 agency with primary jurisdiction over the response to the release
22 and threatened release of Hazardous Substances at or from the
23 Site.

24 B. DTSC contends that it began to investigate the
25 release and threatened release of Hazardous Substances at and/or
26 from the Property in 1982. Subsequent analysis of the soil of
27 the Site, and of groundwater beneath the Site, detected the

1 following Hazardous Substances in the soil ("s") and/or the
2 groundwater ("gw") of the Site: acenaphthene (gw); aldrin (s);
3 anthracene (s); antimony (s); arsenic (gw,s); barium (gw,s);
4 benzene (gw,s); benzo(a)anthracene (s); benzo(b)fluoranthene (s);
5 benzo(k)fluoranthene (s); benzo(a)pyrene (s); benzoic acid (gw);
6 a-BHC (s); b-BHC (s); d-BHC (gw); g-BHC(lindane) (s); bis(2-
7 ethylhexyl)phthalate (gw); butyl benzyl phthalate (s); cadmium
8 (gw,s); carbon disulfide (gw); chlordane (s); chlorobenzene (s);
9 chromium (gw,s); chrysene (s); copper (gw,s); 4,4-DDD (s); 4,4-
10 DDE (s); 4,4-DDT (s); 1,2-dichlorobenzene (gw,s); 1,4-
11 dichlorobenzene (s); 1,1-dichloroethane (gw); 1,2-dichloroethane
12 (gw,s); 1,2-dichloroethylene (gw,s); dieldrin (s); diethyl
13 phthalate (gw); 2,4-dimethylphenol (gw,s); di-n-octyl phthalate
14 (s); endosulfan sulfate (s); endrin (s); endrin aldehyde (s);
15 ethylbenzene (gw,s); fluoranthene (gw); fluorene (gw); heptachlor
16 (gw,s); heptachlor epoxide (s); isophorone (s); lead (gw,s);
17 mercury (gw,s); methoxychlor (s); 4-methyl-2-pentanone (s);
18 naphthalene (gw,s); nickel (gw,s); phenanthrene (s);
19 polychlorinated biphenyls (PCBs: arochlor 1016, 1221, 1232, 1242,
20 1248, 1254, 1260) (s); phenol (gw); pyrene (s); selenium (gw);
21 silver (gw,s); styrene (s); 1,1,2,2-tetrachloroethane (s);
22 tetrachloroethylene (i.e. perchloroethylene) (gw,s); thallium
23 (gw); toluene (gw,s); toxaphene (s); 1,2,4-trichlorobenzene (s);
24 trichloroethylene (gw,s); vanadium (gw,s); vinyl chloride (gw);
25 xylene (gw,s); and zinc (gw,s).

26 C. DTSC contends that it has incurred Response Costs
27 to date in excess of \$4,500,000. DTSC, moreover, will incur

1 Response Costs in the future conducting or supervising further
2 removal and remedial activities in response to the release and
3 threatened release of Hazardous Substances at or from the Site.
4 DTSC estimates that the removal and remedial activities that must
5 be performed at and for the Site in the future, whether by DTSC
6 or by third parties, in response to the release and threatened
7 release of Hazardous Substances at or from the Site, will cost
8 approximately \$8,700,000.

9 D. On or about March 14, 1996, DTSC issued a Consent
10 Order, Docket No. HSA 95/96-060, (the "Consent Order") to a group
11 of more than 50 companies alleged to have sent Hazardous
12 Substances to the Site for treatment and/or disposal (the
13 "Group"). DTSC issued the Consent Order to ensure that any
14 release or threatened release of a Hazardous Substance at or from
15 the Site would be investigated and addressed by proposed
16 mitigation measures. By signing the Consent Order, the Group
17 expressly agreed, among other things: (1) to prepare a Baseline
18 Risk Assessment Report for the Site; (2) to prepare and to
19 implement, for a time, a Groundwater Monitoring Workplan for the
20 Site; (3) to conduct a Site Remedial Investigation and to
21 prepare draft and final Remedial Investigation Reports and
22 Feasibility Studies for the Site; (4) to prepare draft and final
23 Risk Assessment Reports for the Site; (5) to revise the Site's
24 Public Participation Plan; (6) to prepare a draft Remedial
25 Action Plan for the Site; (7) to pay DTSC \$310,000 towards its
26 Response Costs at the Site, and to begin negotiations with DTSC
27 for DTSC's unreimbursed Site Response Costs; and (8) to toll the

1 statute of limitations arguably applicable to certain Site-
2 related claims that DTSC contends it has against the members of
3 the Group. Since DTSC issued the Consent Order, the Group's
4 membership has increased to 64 companies, 62 of which have signed
5 the Consent Order. Moreover, 63 of the 64 members of the Group
6 have executed a further Tolling Agreement with DTSC, tolling the
7 statute of limitations arguably applicable to certain Site-
8 related claims that DTSC contends it has against members of the
9 Group until and including December 31, 1998.

10 E. In accordance with the Consent Order, the Group
11 has been performing environmental removal activities at and for
12 the Site, and it is anticipated that the Group will perform more
13 such activities to comply fully with the Consent Order.

14 F. The Complaint alleges:

15 1. that the Defendants owned and/or operated the
16 Property from or about January 10, 1978 until or about March 4,
17 1979, at a time when Hazardous Substances were released or
18 threatened to be released at the Property and/or from the
19 Property to other portions of the Site;

20 2. that removal and remedial action is necessary
21 at and for the Site to remove and remedy the Hazardous Substances
22 released and/or threatened to be released at or from the Site;
23 and

24 3. that both of the Defendants are jointly and
25 severally liable to DTSC for all of its Response Costs.

26 G. The Complaint seeks to recover all Response Costs
27 that have been and will be incurred by DTSC, and certain

1 declaratory relief.

2 H. Each of the Parties to this Consent Decree
3 represents and acknowledges that, in deciding whether to enter
4 into this Consent Decree, it has not relied on any statement of
5 fact, statement of opinion, or representation, express or
6 implied, made by any other Party. Each of the Parties to this
7 Consent Decree has investigated the subject matter of this
8 Consent Decree to the extent necessary to make a rational and
9 informed decision to execute it, and has consulted independent
10 counsel.

11 I. This Consent Decree was negotiated and executed by
12 DTSC and the Defendants in good faith to avoid prolonged and
13 complicated litigation. DTSC, moreover, has negotiated and
14 executed this Consent Decree to further the public interest.
15

16 The Court, on the motion and with the consent of each
17 of the Parties, hereby ORDERS, ADJUDGES AND DECREES as follows:

18 1. JURISDICTION

19 The Court has subject matter jurisdiction over the
20 matters alleged in this action pursuant to 28 U.S.C. section 1331
21 and 42 U.S.C. section 9613(b) and personal jurisdiction over each
22 of the Parties to this Consent Decree. Venue is appropriate in
23 this district pursuant to 42 U.S.C. section 9613(b). The Court,
24 further, has the authority to enter this Consent Decree as a
25 consent decree of the Court.

26 2. SETTLEMENT OF DISPUTED CLAIMS

27 2.1 This Consent Decree represents a fair, reasonable

1 and equitable settlement of the matters addressed herein.

2 2.2 For the purposes of this Consent Decree, the
3 Defendants admit none of the allegations of the Complaint.
4 Nothing in this Consent Decree shall be construed as an admission
5 of any issue of law or fact or of any violation of law.

6 2.3 Except as set forth in section 4.2 of this Consent
7 Decree, nothing in this Consent Decree shall prejudice, waive, or
8 impair any right, remedy or defense that the Defendants may have
9 in any other or further legal proceeding.

10 3. PAYMENT OF COSTS

11 3.1 Within thirty (30) days of the Court's approval
12 and entry of this Consent Decree as a consent decree of the
13 Court, the Defendants shall pay DTSC the sum of four hundred
14 thousand dollars (\$400,000) in partial reimbursement of DTSC's
15 Response Costs; provided, however, that if the order approving
16 and entering this Consent Decree is appealed, Defendants shall
17 pay DTSC the sum of four hundred thousand dollars (\$400,000)
18 within thirty (30) days of entry of a final judicial order
19 approving and entering this Consent Decree, which final judicial
20 order is no longer subject to any appeal or review by any court
21 of competent jurisdiction.

22 3.2 The payment required by section 3.1, above, shall
23 be made by certified or cashier's check made payable to Cashier,
24 California Department of Toxic Substances Control, and shall bear
25 on its face both the docket number of this proceeding and the
26 phrase "Site No. 200011". That payment shall be sent to:

27 ///

1 Department of Toxic Substances Control
Accounting/Cashier
2 400 P Street, 4th Floor
P.O. Box 806
3 Sacramento, CA 95812-0806

4 A copy of the check shall be mailed to:

5 Barbara Cook, P.E.
Department of Toxic Substances Control
6 Northern California--Coastal Cleanup Operations
700 Heinz Avenue, Suite 200
7 Berkeley, CA 94710

8 3.3 Each of the Parties to this action will bear his
9 or its own attorneys' fees and litigation costs.

10 4. RESERVATION OF RIGHTS

11 4.1 Except as expressly provided in this Consent
12 Decree, nothing in the Consent Decree is intended or shall be
13 construed to preclude DTSC from exercising its authority under
14 any law, statute or regulation. Furthermore, nothing in this
15 Consent Decree is intended, nor shall be construed, to preclude
16 any state agency, department, board or entity, other than DTSC,
17 or any local agency, department, board or entity, from exercising
18 its authority under any law, statute or regulation.

19 4.2 Notwithstanding any other provision in the Consent
20 Decree, DTSC reserves the right to institute proceedings in this
21 action or in a new action, seeking to compel either of the
22 Defendants to perform additional investigative, characterization,
23 removal, remedial or response activities at or for the Site,
24 and/or seeking further reimbursement of DTSC's Response Costs
25 (incurred as a result of the circumstances set forth below), if

26 (a) conditions previously unknown to DTSC, for which
27 either of the Defendants is liable under any statute or law, are

1 discovered at the Site after the entry of the Consent Decree, and
2 these conditions indicate that (1) a Hazardous Substance has
3 been or is being released at or from the Site or there is a
4 threat of such release into the environment and (2) the response
5 performed at or for the Site is not protective of human health
6 and the environment, or;

7 (b) DTSC receives information after the entry of the
8 Consent Decree that was not available to DTSC at the time the
9 Consent Decree was entered, concerning matters for which any
10 Defendant is liable, and that information indicates, and the
11 Director of DTSC determines, that the response performed at or
12 for the Site is not protective of human health and the
13 environment.

14 5. PLAINTIFF'S COVENANT NOT TO SUE

15 5.1 Except as provided in section 4.2 above, and
16 conditioned upon receipt of all sums due and owing pursuant to
17 section 3 above, DTSC covenants not to sue the Defendants under
18 sections 107 and 113 of CERCLA, under California Health and
19 Safety Code section 25360, or under any other provision of
20 statutory or common law, to: 1) recover DTSC's Response Costs;
21 and 2) to require the Defendants to conduct investigative,
22 characterization, removal, remedial or response activities in
23 response to the release or threatened release of Hazardous
24 Substances at or from the Site.

25 5.2 Upon the receipt of the payment required by
26 section 3 above, this Consent Decree constitutes and will be
27 treated as a full and complete defense to, and forever will be a

1 complete bar to, the commencement of prosecution of the claims,
2 causes of action and forms of relief described in section 5.1
3 above.

4 6. EFFECT OF CONSENT DECREE

5 6.1 This Consent Decree constitutes the resolution of
6 the Defendants' liability to DTSC in a judicially approved
7 settlement within the meaning of section 113(f)(2) of CERCLA, 42
8 U.S.C. section 9613(f)(2). This Consent Decree requires the
9 Defendants to make a substantial contribution towards DTSC's
10 Response Costs.

11 6.2 Accordingly, upon entry of this Consent Decree as
12 a consent decree of the Court, and provided that the Defendants
13 perform their payment obligation under section 3.1 of this
14 Consent Decree:

15 6.2.1 Defendants shall be entitled to
16 protection against all claims for contribution, pursuant to
17 section 113(f)(2) of CERCLA, 42 U.S.C. § 9613(f)(2), for the
18 "Matters Addressed" by this Consent Decree, to the fullest extent
19 permitted by law. The "Matters Addressed" by this Consent Decree
20 are all actions taken or to be taken by DTSC, by any of the
21 Defendants, or by any third person or entity not a Party to this
22 Consent Decree, in response to the release or threatened release
23 of Hazardous Substances at or from the Site, and all costs
24 incurred or to be incurred by DTSC, by any of the Defendants, or
25 by any third person or entity not a Party to this Consent Decree,
26 in response to said release or threatened release.

27 6.2.2 Without limiting the generality of

1 section 6.2.1 hereof, this Consent Decree shall, to the fullest
2 extent permitted by law, prevent the Defendants from being held
3 liable to any third person or entity not a Party to this Consent
4 Decree for any claims for contribution, indemnity or the like,
5 asserted under any federal, state or common law, arising out of
6 or related to any response, cleanup, removal or remedial actions
7 or costs, which such third parties or entities may take, incur or
8 defray at any time in response to the release or threatened
9 release of Hazardous Substances at or from the Site.

10 6.3 By entering into this Consent Decree, none of the
11 Parties intends to release or waive any right, claim or cause of
12 action they each might have against any third person or entity
13 not a Party to this Consent Decree. Nothing in this Consent
14 Decree is intended, or shall be construed, to waive, release or
15 otherwise affect any right, claim or cause of action held by any
16 Party against, or to provide a covenant not to sue to, any third
17 person or entity not a Party to this Consent Decree, or to in any
18 way limit, restrict, or impair the right of any Party to assert
19 rights, claims, causes of actions and defenses against any third
20 person or entity not a Party to this Consent Decree, including
21 without limitation the right to seek payment, reimbursement,
22 contribution or indemnity from such persons or entities for
23 obligations incurred or to be incurred under this Consent Decree.
24 The Parties specifically reserve any rights, claims, or causes of
25 actions they each might have against any third person or entity
26 not a Party to this Consent Decree.

27 ///

1 7. NOTIFICATION

2 Notification to or communication among the Parties as
3 required or provided for in this Consent Decree shall be
4 addressed as follows:

5 As to DTSC:

6 Barbara Cook, P.E.
7 Department of Toxic Substances Control
8 Northern California--Coastal Cleanup Operations
9 700 Heinz Avenue, Suite 200
10 Berkeley, CA 94710

11 As to Defendants:

12 Norman Rasmussen, Esq.
13 11 Golden Shore Drive, Suite 430
14 Long Beach, CA 90802-4218

15 and

16 Kenneth D. Robin, Esq.
17 2204 Union Street
18 San Francisco, CA 94123

19 and

20 George Yaron, Esq.
21 Davidovitz and Yaron
22 111 Pine Street, 12th Floor
23 San Francisco, CA 94111-5614

24 8. MODIFICATION OF SETTLEMENT AGREEMENT AND CONSENT
25 DECREE

26 This Consent Decree may only be modified upon the
27 written approval of the Parties and the Court.

28 9. APPLICATION OF CONSENT DECREE

29 9.1 This Consent Decree shall apply to and be binding
30 upon DTSC, WDC, Waymire, and each of their respective successors
31 and assigns. This Consent Decree shall inure to the benefit of

1 DTSC, WDC, Waymire, and each of their respective successors and
2 assigns, including but not limited to the purchaser of WDC's
3 assets, Consolidated Drum Reconditioning Company, CDRCo, SW, LLC,
4 a California limited liability company ("Consolidated"). This
5 Consent Decree shall also inure to the benefit of WDC's parent,
6 subsidiary and affiliated corporations, including but not limited
7 to Waymire Drum & Container Company, Inc. ("Waymire Container").
8 This Consent Decree shall also inure to the benefit of the past,
9 present and future officers, directors, employees, agents,
10 attorneys, representatives, insurers and shareholders of WDC,
11 Consolidated and Waymire Container. This Consent Decree shall
12 only inure to the benefit of the past, present and future
13 officers, directors, employees, agents, attorneys,
14 representatives, insurers and shareholders of WDC, Consolidated
15 and Waymire Container (hereafter referred to collectively as the
16 "Related Persons/Entities") in their capacities as such. By
17 entering into this Consent Decree, DTSC does not covenant not to
18 sue any of the Related Persons/Entities on any of the claims,
19 causes of action or forms of relief set forth in section 5.1 of
20 this Consent Decree that does not arise out of the status of the
21 Related Person/Entity as a past, present or future officer,
22 director, employee, agent, attorney, representative, insurer or
23 shareholder of WDC, Consolidated or Waymire Container.

24 9.2 The covenant not to sue set forth in section 5 of
25 this Consent Decree is intended, and shall be construed, to bar
26 DTSC from prosecuting any of the claims, causes of action or
27 forms of relief set forth in section 5.1 of this Consent Decree

1 against WDC, Consolidated and Waymire Container as alleged
2 successors-in-interest to Bedini Barrels, Inc., Bedini Steel Drum
3 Company, Bedini Brothers Company and Bedini Brothers Steel Drum
4 Company (hereafter collectively referred to as the "Bedini
5 Entities"), or any other former owner or operator of the Site.
6 Nothing in this Consent Decree, however, is intended or shall be
7 construed to bar DTSC from prosecuting any claim, cause of action
8 or form of relief described in section 5.1 of this Consent Decree
9 against any former owner or operator of the Site other than WDC,
10 Waymire and Waymire Container, including without limitation the
11 Bedini Entities, their successors or assigns (other than Waymire,
12 Consolidated and Waymire Container), their parent, subsidiary and
13 affiliated corporations, or their current or former officers,
14 directors, employees, agents, attorneys, representatives,
15 insurers or shareholders; provided, however, that this Consent
16 Decree shall bar DTSC from prosecuting any of the claims, causes
17 of action or forms of relief set forth in section 5.1 of this
18 Consent Decree against any Related Person/Entity who or which, as
19 a result of WDC's March 10, 1978 acquisition of Bedini Barrels,
20 Inc., served as an officer, director, employee, agent, attorney,
21 representative, insurer or shareholder of any Bedini Entity at
22 any time between March 10, 1978 and March 4, 1979, inclusive, so
23 long as that Related Person/Entity did not serve at any other
24 time as an officer, director, employee, agent, attorney,
25 representative, insurer or shareholder of any Bedini Entity and
26 only to the extent of the Related Person/Entity's status as a
27 Related Person/Entity and to the extent of the Related

1 Person/Entity's status as an officer, director, employee, agent,
2 attorney, representative, insurer or shareholder of a Bedini
3 Entity between March 10, 1978 and March 4, 1979, inclusive.

4 10. AUTHORITY TO ENTER

5 Each signatory to this Consent Decree certifies that he
6 or she is fully authorized by the Party he or she represents to
7 enter into this Consent Decree, to execute it on behalf of the
8 Party represented and legally to bind that Party.

9 11. INTEGRATION

10 This Consent Decree, including the exhibit incorporated
11 herein by reference, constitutes the entire agreement among the
12 Parties and may not be amended or supplemented except as provided
13 for in this Consent Decree.

14 12. RETENTION OF JURISDICTION

15 The Court shall retain jurisdiction of this matter for
16 the purpose of enforcing the terms of this Consent Decree.

17 13. EXECUTION OF DECREE

18 This Consent Decree may be executed in two or more
19 counterparts, each of which shall be deemed an original, but all
20 of which together shall constitute one and the same instrument.

21
22
23
24
25 ///

26 ///

27 ///

14. APPROVALS OF PARTIES

Plaintiff DTSC consents to this Consent Decree by its
duly authorized representative as follows:

STATE OF CALIFORNIA DEPARTMENT
OF TOXIC SUBSTANCES CONTROL

Dated: 9-28-98

Barbara J. Cook
BARBARA J. COOK, P.E.
Chief, Northern California--Coastal
Cleanup Operations Branch, State of
California Department of Toxic
Substances Control

Defendant Waymire Drum Company, Inc. consents to this
Consent Decree by its duly authorized representative as follows:

WAYMIRE DRUM COMPANY, INC.

Dated: 9-21-98

By: Edward L. Waymire
EDWARD L. WAYMIRE
Its President

Defendant Edward L. Waymire consents to this Consent
Decree as follows:

EDWARD L. WAYMIRE

Dated: 9.21.98

By: Edward L. Waymire

1 APPROVED AS TO FORM:

DANIEL E. LUNGREN, Attorney General
of the State of California
THEODORA BERGER
Assistant Attorney General
KEN ALEX
Supervising Deputy Attorney General

2
3
4
5 Dated: 9-28-98

By:


KEVIN JAMES
Deputy Attorney General

Attorneys for Plaintiff State of
California Department of Toxic
Substances Control

6
7
8
9
10 APPROVED AS TO FORM:

THE LAW OFFICES OF KENNETH D. ROBIN

11
12 Dated: _____

By:


KENNETH D. ROBIN

Attorneys for Defendants Waymire
Drum Company, Inc. and Edward L.
Waymire

13
14
15
16
17 APPROVED AS TO FORM:

DAVIDOVITZ & YARON

18
19 Dated: 25 SEP 98

By:


GEORGE YARON

Attorneys for Defendants Waymire
Drum Company, Inc. and Edward L.
Waymire

20
21
22
23
24 IT IS SO ORDERED, ADJUDGED AND DECREED:

25
26 Dated: _____

UNITED STATES DISTRICT COURT JUDGE

27 C:\DAT\KEVIN\WAYMIRE.CON (8/18/98)

Exhibit A

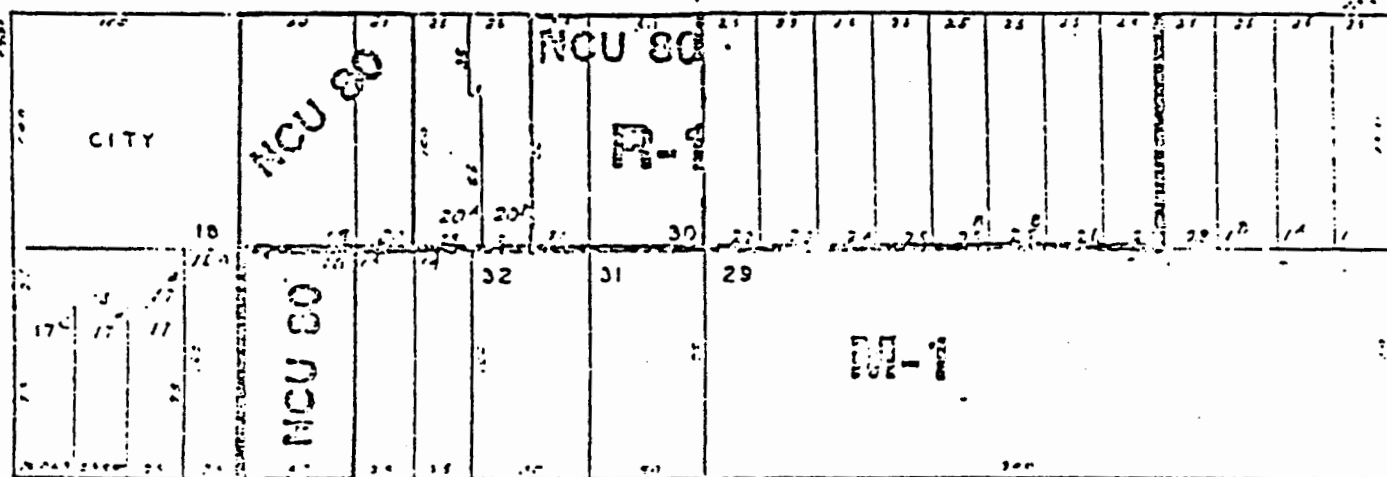
Legal Description of the Property: "Beginning at the point of intersection of the northeasterly line of Thomas Avenue and the northwesterly line of Hawes Street; running thence northwesterly and along said line of Thomas Avenue 300 feet; thence at a right angle northeasterly 100 feet; thence at a right angle southeasterly 300 feet to the northwesterly line of Hawes Street; and thence at a right angle southwesterly along said line of Hawes Street 100 feet to the point of beginning."

BLOCK 4792

SHAFTER

AVE.

INGALLS



THOMAS

AVE.

HAWES

ORIGINAL
FILED

OCT - 5 1998

RICHARD W. WIEKING
CLERK, U.S. DISTRICT COURT,
NORTHERN DISTRICT OF CALIFORNIA

DANIEL E. LUNGREN, Attorney General
of the State of California
THEODORA BERGER, State Bar No. 050108
Assistant Attorney General
KEVIN JAMES, State Bar No. 111103
Deputy Attorney General
2101 Webster Street, 12th Floor
Oakland, California 94612-3049
Telephone: (510) 286-4123

Attorneys for Plaintiff State of California
Department of Toxic Substances Control

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

STATE OF CALIFORNIA DEPARTMENT OF
TOXIC SUBSTANCES CONTROL,

Plaintiff,

v.

WAYMIRE DRUM COMPANY, INC., a
California corporation; and EDWARD
L. WAYMIRE, an individual,

Defendants.

No. C 98-3834

NOTICE OF RELATED CASE

PLEASE TAKE NOTICE that this case is related to *State of California Department of Toxic Substances Control v. Witco Corporation, et al.*, U.S.D.C. N.D. Cal. No. C 97-2390 PJH (the "Witco case"), filed June 26, 1997 and subject to a Consent Decree and a Judgment, both entered December 3, 1997. This case, like the Witco case, is an action brought by the California Department of Toxic Substances Control ("DTSC") to recover the environmental response costs it has incurred in connection with the Bay Area Drum hazardous substances cleanup site in San Francisco. And like the Witco case, this action names as

NOTICE OF RELATED CASE

1 defendants two parties that DTSC alleges are liable for
2 conducting environmental removal and remedial activities in
3 response to the release of hazardous substances at the Bay Area
4 Drum site, and for reimbursing DTSC the costs it has incurred,
5 and will incur in the future, conducting and supervising such
6 activities. Finally, like the Witco case, once this matter is
7 assigned to a United States District Judge or Magistrate,
8 plaintiff DTSC will notice a motion seeking judicial approval and
9 entry, as a consent decree of the court, of a Settlement
10 Agreement and Consent Decree it has concluded with the
11 defendants, resolving their liability to conduct environmental
12 removal and remedial activities at and for the Bay Area Drum site
13 and for reimbursing the costs that DTSC has incurred, and will
14 incur in the future, conducting and supervising such activities.
15

16 Dated: October 2, 1998

DANIEL E. LUNGREN, Attorney General
of the State of California
THEODORA BERGER
Assistant Attorney General

19 By: 

KEVIN JAMES
Deputy Attorney General

21 Attorneys for Plaintiff State of
22 California Department of Toxic
Substances Control

23 KJ:jam
24 C:\KEVIN\WAYMIRE.HTC
(10/2/98)

25
26
27

DANIEL E. LUNGREN, Attorney General
of the State of California
THEODORA BERGER, State Bar No. 050108
Assistant Attorney General
KEVIN JAMES, State Bar No. 111103
Deputy Attorney General
2101 Webster Street, 12th Floor
Oakland, California 94612-3049
Telephone: (510) 286-4123

ORIGINAL
FILED

OCT - 5 1998

RICHARD W. WIEKING
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

Attorneys for Plaintiff State of California
Department of Toxic Substances Control

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

STATE OF CALIFORNIA DEPARTMENT OF
TOXIC SUBSTANCES CONTROL,

Plaintiff,

v.

WAYMIRE DRUM COMPANY, INC., a
California corporation; and EDWARD
L. WAYMIRE, an individual,

Defendants.

C. 98-3834
No.

COMPLAINT FOR RECOVERY OF
RESPONSE COSTS

VRW

PLAINTIFF STATE OF CALIFORNIA DEPARTMENT OF TOXIC
SUBSTANCES CONTROL ("Plaintiff" or "DTSC") alleges as follows:

STATEMENT OF THE ACTION

1. Plaintiff makes these claims for relief under
sections 107(a) and 113(g) of the Comprehensive Environmental
Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C.
§§ 9601 *et seq.*, as amended by the Superfund Amendments and
Reauthorization Act of 1986, Pub. L. 99-499, 100 Stat. 1613
(1986), because Plaintiff, in its own name and through its
predecessor, the Toxic Substances Control Program of the State of

1 California Department of Health Services ("DHS"), has incurred
2 and will in the future incur removal and remedial costs in
3 response to the release and threatened release of hazardous
4 substances at, beneath and from 1212 Thomas Avenue, San
5 Francisco, California (the "Property").

6 JURISDICTION AND VENUE

7 2. This Court has jurisdiction over Plaintiff's
8 claims pursuant to 28 U.S.C. § 1331 and 42 U.S.C. § 9613(b).
9 Venue is proper in this District pursuant to 28 U.S.C. § 1391(b)
10 and 42 U.S.C. § 9613(b) because the subject release and
11 threatened release of hazardous substances into the environment
12 occurred in this district.

13 PLAINTIFF

14 3. Plaintiff is a department of the State of
15 California's ("California") Environmental Protection Agency.
16 California is one of the several states of the United States of
17 America. California is a "state" within the meaning of 42 U.S.C.
18 § 9601(27). Plaintiff is a California department responsible,
19 under California law, for California's actions under CERCLA.

20 DEFENDANTS

21 4. Defendant Waymire Drum Company, Inc. ("WDC") is
22 and was a California corporation doing business in California.
23 Beginning in or about 1978, and continuing until or about 1979,
24 WDC, in its own name, doing business as Bedini Steel Drum Corp.,
25 and through its affiliate, Waymire Drum and Barrel Company, Inc.,
26 owned the Property and operated a drum reconditioning business on
27 the Property.

1 5. Defendant Edward L. Waymire ("Waymire") is a
2 citizen of California. Plaintiff is informed and believes and
3 thereon alleges that, at all times relevant hereto, Waymire was
4 the president and managing shareholder of WDC. Plaintiff is
5 further informed and believes and thereon alleges that, beginning
6 in or about 1978 and continuing until or about 1979, Waymire had
7 sufficient control over WDC's drum reconditioning operations on
8 the Property that he could have prevented the releases and
9 threatened releases of hazardous substances alleged herein to
10 have occurred at and from the Property during that time. As
11 such, plaintiff is informed and believes and thereon alleges
12 that, beginning in or about 1978 and continuing until or about
13 1979, Waymire operated a drum reconditioning business on the
14 Property.

15 GENERAL ALLEGATIONS

16 6. The Property is located on the northwest corner of
17 the intersection of Thomas Avenue and Hawes Street in San
18 Francisco. The Property occupies approximately 30,000 to 35,000
19 square feet, one half of which is a former office/process
20 building, and one half of which is a yard previously used for
21 drum storage and, at various times, drum reconditioning
22 activities. The Property is bordered by residential and vacant
23 properties to the north, and by industrial properties to the
24 northeast, east, south and west.

25 7. Beginning in or about 1948, and continuing until
26 about 1987, various persons and entities, including WDC and
27 Waymire, operated drum reconditioning businesses on the Property.

1 The various drum reconditioning businesses that operated on the
2 Property received steel and plastic drums containing residues of
3 aqueous wastes, organic chemicals, acids, oxidizers and oils from
4 a variety of industrial establishments. As part of the
5 reconditioning process, the drums were flushed and recoated. As
6 a result, the residual contents of the drums, as well as
7 reconditioning chemicals, were released, or threatened to be
8 released, at and from the Property. Ultimately, the residual
9 drum contents and reconditioning chemicals released, or
10 threatened to be released, at and from the Property were
11 released, or threatened to be released, to the soil of the
12 Property, to the soil of parcels of land adjacent to the
13 Property, and to groundwater beneath and migrating from the
14 Property. (The total area to which hazardous substances have
15 been released, or threatened to be released, at and from the
16 Property shall be referred to herein as the "Site").

17 8. In or about October 1983, the San Francisco
18 Department of Public Health ("SFDPH") inspected the Property. In
19 or about December 1983, SFDPH and DTSC, through its predecessor
20 DHS, inspected the Property and took soil and liquid samples at
21 the Property and at adjacent locations. The results of that
22 sampling revealed elevated levels of copper, lead, zinc,
23 selenium, polychlorinated biphenyls ("PCBs") and solvents at the
24 various locations sampled.

25 9. On or about May 21, 1985, DTSC, through its
26 predecessor DHS, collected liquid and solid samples from the
27 process collection sumps at the Property. The results of that

1 sampling showed elevated concentrations of barium, cadmium,
2 cobalt, chromium, copper, nickel and zinc, as well as not-
3 naturally occurring concentrations of volatile organic solvents
4 and pesticides such as chlordane and toxaphene.

5 10. Beginning in or about 1987, and continuing until
6 about 1988, DTSC, through its predecessor DHS, conducted an
7 expedited response action ("ERA") at the Site. The ERA entailed
8 the partial removal of hazardous substance-contaminated soil and
9 stored waste materials from the Property; the partial removal of
10 contaminated soil from residences and a vacant lot adjacent to
11 the Property; the removal of buried drums from along the
12 Property's northern fenceline adjacent to the vacant lot; the
13 disposal of the hazardous-substance contaminated soil, waste
14 materials and drums removed from the Site at one or more
15 permitted Class I hazardous waste disposal facilities; the
16 interim capping of the Property's drum yard; and the fencing of
17 that drum yard.

18 11. In or about 1988 and 1989, DTSC, through its
19 predecessor DHS, investigated the potential continued presence of
20 hazardous substances in Site soil and groundwater. In or about
21 July 1990, DTSC, through its predecessor DHS, arranged for 2,150
22 gallons of hazardous substance-contaminated groundwater generated
23 during Site well development and sampling activities to be
24 manifested, transported from the Site and treated at an off-Site
25 permitted treatment facility. That same month, DTSC, through its
26 predecessor DHS, arranged for 76 drums of hazardous substance-
27 contaminated soil generated during Site soil drilling and

1 sampling activities to be manifested, transported from the Site
2 and disposed of at a permitted Class I hazardous waste disposal
3 facility.

4 12. In or about 1992, DTSC further investigated the
5 potential continued presence of hazardous substances in Site soil
6 and groundwater. In or about 1992, DTSC sampled outdoor soils at
7 the Site, as well as the concrete floor of the Property's process
8 building and soils beneath that floor. And in or about October
9 1992, DTSC arranged for two drums of hazardous substance-
10 contaminated soil generated during Site soil drilling and
11 sampling activities to be manifested, transported from the Site
12 and disposed of at a permitted Class I hazardous waste disposal
13 facility.

14 13. Since 1993, DTSC has reviewed and commented upon
15 draft Risk Assessment Workplans prepared for the Site by certain
16 private parties, most of which have agreed to conduct
17 environmental removal and remedial activities at and for the Site
18 pursuant to a Consent Order (the "Consent Order"), No. HSA 95/96-
19 060, issued by DTSC. In or about October 1993, those private
20 parties, acting under DTSC supervision, arranged for seven drums
21 of hazardous substance-contaminated rinse and groundwater
22 generated during Site well development and sampling activities in
23 1992 to be manifested, transported from the Site and treated at
24 an off-Site permitted treatment facility. In or about July 1995,
25 said private parties, acting under DTSC supervision, conducted
26 flux-chamber air sampling at the Site. In or about August 1995,
27 the private parties conducted groundwater sampling at the Site,

1 under DTSC supervision; the private parties reported the results
2 of that sampling to DTSC in February 1996. Since February 1996,
3 the private parties, acting under DTSC supervision, have among
4 other things prepared a Baseline Risk Assessment Report for the
5 Site, submitted a Remedial Investigation Report for the Site and
6 proposed further interim removal measures at the Site by which
7 soils in the backyards of certain residences adjacent to the
8 Property will be removed and replaced.

9 14. In the course of the sampling conducted at the
10 Site, the following substances have been detected in the
11 groundwater ("gw") and/or the soil ("s") of the Site:
12 acenaphthene (gw); aldrin (s); anthracene (s); antimony (s);
13 arsenic (gw,s); barium (gw,s); benzene (gw,s); benzo(a)anthracene
14 (s); benzo(b)fluoranthene (s); benzo(k)fluoranthene (s);
15 benzo(a)pyrene (s); benzoic acid (gw); a-BHC (s); b-BHC (s); d-
16 BHC (gw); g-BHC(lindane) (s); bis(2-ethylhexyl)phthalate (gw);
17 butyl benzyl phthalate (s); cadmium (gw,s); carbon disulfide
18 (gw); chlordan (s); chlorobenzene (s); chromium (gw,s); chrysene
19 (s); copper (gw,s); 4,4-DDD (s); 4,4-DDE (s); 4,4-DDT (s); 1,2-
20 dichlorobenzene (gw,s); 1,4-dichlorobenzene (s); 1,1-
21 dichloroethane (gw); 1,2-dichloroethane (gw,s); 1,2-
22 dichloroethylene (gw,s); dieldrin (s); diethyl phthalate (gw);
23 2,4-dimethylphenol (gw,s); di-n-octyl phthalate (s); endosulfan
24 sulfate (s); endrin (s); endrin aldehyde (s); ethylbenzene
25 (gw,s); fluoranthene (gw); fluorene (gw); heptachlor (gw,s);
26 heptachlor epoxide (s); isophorone (s); lead (gw,s); mercury
27 (gw,s); methoxychlor (s); 4-methyl-2-pentanone (s); naphthalene

(gw,s); nickel (gw,s); phenanthrene (s); polychlorinated biphenyls (PCBs: arochlor 1016, 1221, 1232, 1242, 1248, 1254, 1260) (s); phenol (gw); pyrene (s); selenium (gw); silver (gw,s); styrene (s); 1,1,2,2-tetrachloroethane (s); tetrachloroethylene (i.e. perchloroethylene) (gw,s); thallium (gw); toluene (gw,s); toxaphene (s); 1,2,4-trichlorobenzene (s); trichloroethylene (gw,s); vanadium (gw,s); vinyl chloride (gw); xylene (gw,s); and zinc (gw,s).

15. In the course of the sampling conducted at the Site, the following substances have been detected in the soil of the Property's process building in concentrations that render them hazardous wastes, or potential hazardous wastes, under California law: antimony; arsenic; barium; benzene; cadmium; chromium; copper; 4,4-DDE; 4,4-DDD; 4,4-DDT; lead, mercury, nickel; PCB-1260; tetrachloroethylene; trichloroethylene and zinc.

16. In the course of the sampling conducted at the Site, the following substances have been detected in the Site's groundwater in concentrations that exceed safe drinking water standards: benzene; chromium; 1,1-dichloroethane; 1,2-dichloroethene; cis-1,2-dichloroethylene; trans-1,2-dichloroethylene; lead; tetrachloroethylene; toluene; trichloroethylene and vinyl chloride.

17. The materials found in the Site's soil and groundwater, and in the Property's process collection sumps, which materials are set forth in paragraphs 8, 9, 14, 15 and 16 hereof, constitute "hazardous substances" within the meaning of

1 42 U.S.C. § 9601(14).

2 18. On March 14, 1996, DTSC issued the Consent Order
3 to over fifty private parties. By signing the Consent Order,
4 those private parties agreed to undertake, under DTSC
5 supervision, the following activities, among others, at and for
6 the Site: preparation of a Baseline Risk Assessment Report;
7 conduct (for a time) of groundwater monitoring; conduct of a
8 remedial investigation and a feasibility study; preparation of
9 Remedial Investigation, Feasibility Study and Risk Assessment
10 Reports; preparation of a revised Public Participation Plan; and
11 preparation of a draft Remedial Action Plan.

12 19. On April 4, 1996, DTSC issued an Imminent and
13 Substantial Endangerment Determination and Order (the "ISE
14 Order"), I&SE 95/96-004, to more than twenty additional private
15 parties, including defendant WDC. The ISE Order requires the
16 parties to whom or which it was issued to undertake, under DTSC
17 supervision, the following activities, among others, at and for
18 the Site: preparation of a Baseline Risk Assessment Report;
19 conduct (for a time) of groundwater monitoring; conduct of a
20 remedial investigation and a feasibility study; preparation of
21 Remedial Investigation, Feasibility Study and Risk Assessment
22 Reports; preparation of a revised Public Participation Plan; and
23 preparation of a draft Remedial Action Plan.

24 20. The activities conducted and supervised, and to be
25 conducted and supervised, by DTSC and DHS at and for the Site,
26 including but not limited to those activities described more
27 fully in paragraphs 8, 9, 10, 11, 12, 13, 18 and 19 hereof, were,

1 are and will be "removal" or "remedial" activities within the
2 meaning of 42 U.S.C. §§ 9601(23) and 9601(24). As such, they
3 were, are and will be "response" activities within the meaning of
4 42 U.S.C. § 9601(25).

5 21. The removal and remedial activities conducted and
6 supervised, and to be conducted and supervised, by DTSC and DHS
7 in connection with the Site were, are and will be conducted in
8 response to the "release" and threatened "release" (within the
9 meaning of 42 U.S.C. § 9601(22)) of "hazardous substances"
10 (within the meaning of 42 U.S.C. § 9601(14)) at the Site.

11 22. DTSC, in its own name and through its predecessor
12 DHS, has incurred costs to date in excess of \$4.5 million
13 conducting and supervising removal activities in response to the
14 release and threatened release of hazardous substances at the
15 Site. These costs were incurred in a manner not inconsistent
16 with the National Contingency Plan ("NCP"), 40 C.F.R. Part 300.
17 DTSC has thus far secured reimbursement of less than \$675,000 of
18 these costs.

19 23. DTSC will incur costs in the future conducting and
20 supervising removal and remedial activities in response to the
21 release and threatened release of hazardous substances at the
22 Site. These future costs will be incurred in a manner not
23 inconsistent with the NCP.

24 24. The Site is a "facility" or contains "facilities",
25 within the meaning of 42 U.S.C. § 9601(9).

26 25. The hazardous substances released and threatened
27 to be released at the Site were released and threatened to be

1 released, and are threatened to be further released, to the
2 "environment", within the meaning of 42 U.S.C. § 9601(8).

3 26. DTSC has notified WDC that it is legally
4 responsible for any costs incurred by DTSC conducting and
5 supervising removal and remedial activities in response to the
6 release and threatened release of hazardous substances at the
7 Site.

8 FIRST CLAIM FOR RELIEF

9 (Claim for Recovery of Response Costs Pursuant to
10 section 107(a) of CERCLA)

11 27. Plaintiff incorporates the allegations of
12 paragraphs 1 through 26, inclusive, as though fully set forth
13 herein.

14 28. Defendant WDC owned, and defendants WDC and
15 Waymire operated, a drum reconditioning business on the Property
16 at a time when hazardous substances were released, or threatened
17 to be released, at the Property and from the Property to the
18 remainder of the Site. As such, WDC and Waymire are jointly and
19 severally liable to DTSC for the response costs it has incurred,
20 in its own name and through its predecessor DHS, in response to
21 the release and threatened release of hazardous substances at the
22 Site, pursuant to section 107(a)(3) of CERCLA, 42 U.S.C. §
23 9607(a)(3).

24 29. WDC and Waymire are each persons described in
25 section 107(a) of CERCLA, 42 U.S.C. § 9607(a), with respect to
26 one or more of the hazardous substances that were released and/or
27 threatened to be released at the Site.

1 30. WDC and Waymire are jointly and severally liable
2 to DTSC under section 107(a) of CERCLA, 42 U.S.C. § 9607(a), for
3 all costs that DTSC and DHS have incurred conducting and
4 supervising response activities at and for the Site.

5 SECOND CLAIM FOR RELIEF

6 (Claim for Declaratory Relief Pursuant to
7 section 113(g)(2) of CERCLA)

8 31. Plaintiff incorporates the allegations of
9 paragraphs 1 through 30, inclusive, as though fully set forth
10 herein.

11 32. Pursuant to section 113(g)(2) of CERCLA, 42 U.S.C.
12 § 9613(g)(2), DTSC is entitled to a declaratory judgment that WDC
13 and Waymire are each jointly and severally liable to DTSC in any
14 subsequent action brought by DTSC to recover further costs or
15 damages incurred in response to the release or threatened release
16 of hazardous substances at the Site.

17 PRAYER FOR RELIEF

18 WHEREFORE, Plaintiff requests:

19 1. As to the first claim for relief, pursuant to 42
20 U.S.C. § 9607(a), that defendants WDC and Waymire each be ordered
21 jointly and severally to pay Plaintiff all of the costs incurred
22 by DTSC and DHS in response to the release and threatened release
23 of hazardous substances described herein;

24 2. As to the second claim for relief, that the Court
25 declare that defendants WDC and Waymire are each jointly and
26 severally liable to Plaintiff for all the costs of removal,
27 remedial and response action it will incur in the future in

1 response to the release and threatened release of hazardous
2 substances described herein;

3 3. That the Court award Plaintiff its attorneys'
4 fees;

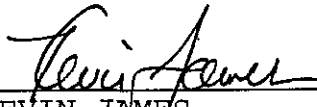
5 4. That the Court award Plaintiff its costs of suit;
6 and

7 5. That the Court enter such other and further relief
8 as it deems just and proper.

9 Dated: 10-1-98

DANIEL E. LUNGREN, Attorney General
of the State of California
THEODORA BERGER
Assistant Attorney General

10
11
12 By:



KEVIN JAMES
Deputy Attorney General

13
14 Attorneys for Plaintiff State of
15 California Department of Toxic
Substances Control

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